



Oliphant, K., & Morris, A. (2016). England and Wales. In *European Tort Law 2015* (pp. 140-173). (European Tort Law Yearbook; Vol. 5, No. 1). de Gruyter. <https://doi.org/10.1515/tortlaw-2016-0109>

Peer reviewed version

Link to published version (if available):
[10.1515/tortlaw-2016-0109](https://doi.org/10.1515/tortlaw-2016-0109)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via De Gruyter at <https://www.degruyter.com/view/j/etly.2016.5.issue-1/tortlaw-2016-0109/tortlaw-2016-0109.xml?format=INT>. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

I. England and Wales

Annette Morris and Ken Oliphant

A. Legislation

1. Social Action, Responsibility and Heroism Act 2015 (SARAH Act)

- 1 The Social Action, Responsibility and Heroism Act 2015 received the Royal Assent on 16 February 2015.¹ Its purpose is set out in its Introduction, which describes it as '[a]n Act to make provision as to matters to which a court must have regard in determining a claim in negligence or breach of statutory duty.' Lying behind this is a belief that the current law discourages benevolent interventions for the benefit of others. The ulterior objective is to correct this misperception and to reassure volunteers, etc, about their potential liabilities. As the Government minister (Lord Faulks) put it when introducing the Bill's second reading in the House Lords: 'Its core aim is to provide reassurance to people who act in socially beneficial ways, behave in a generally responsible manner, or act selflessly to protect someone in danger by ensuring that the courts recognise their actions and always take that context into account in the event that something goes wrong and they are sued.'² The Act explicitly formed part of the then Coalition government's wider programme of measures to tackle what it saw as unjustified and dubious claims and to reduce fears of litigation.³
- 2 The Act's scope of application is prescribed in sec 1: 'This Act applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.' In the standard taxonomy of duty, breach and causation, the Act addresses the question of breach of duty, which entails a comparison of the

¹ For the Bill Stages of the SARAH Act, see: <<http://services.parliament.uk/bills/2014-15/socialactionresponsibilityandheroism.html>>.

² House of Lords Debates (HL Deb) 4 November 2014 col 1545.

³ Ibid.

defendant's conduct in causing the injury with the conduct that would be expected of the reasonable person.

- 3 The Act's key concepts are: (1) '*Social Action*': 'when the person was acting for the benefit of society or any of its members' (sec 2); (2) '*Responsibility*': 'demonstrat[ing] a predominantly responsible approach towards protecting the safety or other interests of others' (sec 3); and (3) '*Heroism*': 'acting heroically by intervening in an emergency to assist an individual in danger' (sec 4). The Act imposes on the court the rather anodyne duty to 'have regard' to each of the above considerations in deciding whether there was a breach of duty. It remains open to the court to impose liability even where the defendant was 'heroically' 'acting for the benefit of society', and 'demonstrated a predominantly responsible approach' towards the safety of others. However, it is envisaged that such considerations might 'tip the balance' in what would otherwise be a finely balanced case.
- 4 The Act has been subjected to considerable criticism from both political opponents and legal experts. It has been called 'the most ridiculous piece of legislation approved by parliament in a very long time',⁴ 'of no importance at all... useless',⁵ a 'gimmick'⁶ and 'vanity legislation' – the parliamentary equivalent to 'vanity publishing'.⁷ One widespread criticism has been that the Act is redundant because the common law already allows courts to attach due weight to 'social action', 'heroism', etc, in considering whether someone was negligent: in assessing the question of breach of duty, courts do in fact habitually take account of 'social utility' alongside the other 'breach factors' (the probability of harm, gravity of foreseeable harm and cost of precautions).⁸ In fact, the legislation is strongly reminiscent of the earlier attempt to re-state the common law in sec 1 of the Compensation Act 2006⁹ and covers at least part of the same ground. The obligation on the court under the new legislation is mandatory ('must have regard') rather than merely permissive ('may ... have regard') as under the earlier statute, though it is hard to see how this slight change could affect the court's balancing of the relevant factors.
- 5 It has also been noted that the Act serves no useful purpose because the mischief it was intended to address is illusory. On the Government's own evidence, the amount of volunteering has been rising, not falling,¹⁰ and the evidence that the

⁴ HL Deb, 6 January 2015 col 253 (Lord Pannick).

⁵ HL Deb, 4 November 2014 col 1549 (Lord Lloyd).

⁶ HL Deb, 4 November 2014 col 1551 (Lord Beecham).

⁷ HL Deb, 6 January 2015 col 257 (Lord Beecham).

⁸ See eg *Watt v Hertfordshire CC* [1954] 2 All England Law Reports (All ER) 368 (fire brigade case); cf *Daborn v Bath Tramways* [1946] 2 All ER 333 (contributory negligence; lenient standard of care owed by ambulances during wartime).

⁹ Noted by *K Oliphant*, England and Wales, in: H Koziol/BC Steininger (eds), *European Tort Law* (hereinafter: ETL) 2006 (2008) 153, no 1 ff.

¹⁰ HL Deb, 4 November 2014 col 1549 (Lord Lloyd).

common law of negligence was deterring socially minded people from benevolent intervention for the benefit of others is extremely sketchy indeed.

- 6 A further criticism is that the SARAH Act is poorly drafted. According to the former Law Lord, Lord Lloyd of Berwick, ‘all it does is add confusion’.¹¹ The Act defines ‘social action’ as ‘acting for the benefit of any [member of society]’ (sec 2), but it is hard to accept that it should be enough that just one other member of society is to be benefited, especially when one considers that that person could be the defendant’s spouse or relative, or even a criminal – a possibility envisaged in the Parliamentary debates.¹² The concept of ‘a predominantly responsible approach’ (sec 3) also seems problematic. Why should the victim of a road accident be deprived of compensation just because the defendant *ordinarily* drives carefully? The focus of tort law should be the interaction between claimant and defendant, not the latter’s habitual behaviour. Everyone agrees with that proposition, but the Act arguably does not give effect to it. As was noted during the debates, ‘it is not the intention of this clause that, when a doctor is sued for negligence for cutting off my right leg because I had a pain in my left leg, it should then be open to the doctor to plead in his or her defence, “I have been treating legs for 40 years and have never before made such a mistake.”’¹³ Lastly, the language of heroism (sec 4: ‘acting heroically’) can be criticised in that a selfless disregard for one’s personal safety in rescuing another should not diminish the rights of third parties injured by the rescue’s execution. Even superheroes can be clumsy – as the hopelessly inept *Captain Klutz*¹⁴ humorously reminds us – and there is no reason to grant them special privileges regarding liability for harm that results from their maladroit interventions.

2. Medical Innovation Bill (Saatchi Bill)¹⁵

- 7 The context to Lord Saatchi’s Medical Innovation Bill, introduced as a Private Members’ Bill during the 2014–15 Parliamentary session, and then again in the 2015–16 legislative session,¹⁶ was provided by a UK Department of Health

¹¹ HL Deb, 4 November 2014 col 1550.

¹² HL Deb, 4 November 2014 col 1553 (Lord Beecham).

¹³ HL Deb, 6 January 2015 col 253 (Lord Pannick). Lord Pannick argued that the problem was that the word ‘activity’ earlier in the same provision was too broad and he unsuccessfully proposed replacing it with ‘act or omission’, which he felt was more precise. See also the further criticism by the former Law Lord, Lord Brown of Eaton-under-Heywood, HL Deb, 6 January 2015 cols 253–255.

¹⁴ See <https://en.wikipedia.org/wiki/Captain_Klutz>.

¹⁵ See generally *N Poole*, Medical Innovation Bill: Re-writing the Law of Clinical Negligence [2014] *Journal of Personal Injury Law* (JPIL) 127.

¹⁶ See <<http://services.parliament.uk/bills/2015-16/medicalinnovation.html>>.

consultation on legislation to encourage medical innovation.¹⁷ This started from the premise that the possibility of a clinical negligence claim is a potential barrier to departing from established procedures and carrying out an innovative treatment.¹⁸ The well-known ‘*Bolam* test’¹⁹ was highlighted as a particular obstacle, quoting from Butler-Sloss LJ in *Simms v Simms*:²⁰ ‘if one waited for the *Bolam* test to be complied with to its fullest extent, no innovative work such as the use of penicillin or performing heart transplant surgery would ever be attempted.’ The consultation document summarised its understanding of the legal position in the following terms: ‘to avoid a successful claim in negligence a doctor should be able to demonstrate support for a decision from a responsible body of medical opinion (*Bolam*) and that the opinion is capable of withstanding logical analysis by the courts (*Bolitho*).’²¹

- 8 This seems to rest on a somewhat confused understanding. In the first place, it involves a blatant error about the incidence of the burden of proof: it lies on the claimant, not the defendant doctor. Beyond that, one must also point out that the *Bolam* test acts as a shield for the doctor, not as a hurdle the doctor has to surmount in order to escape liability. Adherence to a responsible body of medical opinion suffices to counter the allegation of negligence, but it is not the only way of doing so. The doctor can simply argue that, in all the circumstances of the case, the treatment was reasonable. All this is actually quite clear from McNair J’s own formulation of the principle in *Bolam* itself: ‘there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.’²² He did not say: ‘only if he conforms with one of those standards’.
- 9 The Saatchi Bill picked up on the Department of Health’s concern and proposed the rule that ‘[i]t is not negligent for a doctor to depart from the existing range of accepted medical treatments for a condition... if the decision to do so is taken responsibly’ (clause 1(2)). The apparently innocent word ‘responsibly’ was then subject to detailed and confusing elaboration in four further provisions of

¹⁷ *Department of Health, Legislation to Encourage Medical Innovation: A Consultation* (2014).

¹⁸ *Ibid*, para 2.1.

¹⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 Weekly Law Reports (WLR) 582.

²⁰ [2003] Law Reports, Family Division (Fam) 83, para 48.

²¹ *Department of Health* (fn 17) para 2.3. ‘*Bolitho*’ refers to *Bolitho v City and Hackney Health Authority* [1988] Appeal Cases (AC) 232, in which the House of Lords added the stated gloss to the *Bolam* test.

²² *Bolam* [1957] 1 WLR 582, 587.

the Bill (clause 1(4)-(7)), none of which seem to require that the doctor *reasonably*²³ weighs up the relative pros and cons of the treatment; the doctor simply has to ‘consider’ them.

- 10 The Bill attracted vociferous criticism, including that of numerous medical organisations.²⁴ Paramount amongst the concerns were that the Act would strip away protection against *irresponsible* innovation and exploitation of patients’ lack of medical knowledge at times of mental vulnerability.
- 11 After the Bill’s re-introduction to Parliament in 2015–16, it did not proceed beyond its first reading.²⁵ Instead, its core provisions were included in a different Bill, the Access to Medical Treatments (Innovation) Bill (Bill No 8 of 2015–16), but these were dropped as that Bill progressed through Parliament and were not enacted in the resulting Access to Medical Treatments (Innovation) Act 2016.²⁶

B. Cases

1. *O (A Child) v Rhodes* [2015] United Kingdom Supreme Court (UKSC) 32, [2016] AC 219: Intentional Infliction of Psychological Harm²⁷

a) Brief Summary of the Facts

- 12 The defendant, a concert pianist, author and television film maker, wished to publish an autobiographical memoir in which he recounted in graphic terms the brutal sexual abuse and rape he had suffered over a period of several years of his childhood and the profound psychological effects it had on him, including

²³ The word ‘reasonable’ appeared more than once in the Bill, but was not applied to the doctor’s consideration of the risks, benefits, etc.

²⁴ Including the British Medical Association and General Medical Council. See respectively <<http://www.bma.org.uk/-/media/files/pdfs/working%20for%20change/policy%20and%20lobbying/bmaresponselegislationencouragemedicalinnovation.pdf>> and http://www.gmc-uk.org/GMC_s_response_to_the_consultation_on_the_Medical_innovation_Bill.pdf_59860303.pdf>.

²⁵ <<http://services.parliament.uk/bills/2015-16/medicalinnovation.html>>.

²⁶ For the history of the Bill and the text of the Act as adopted, see <<http://services.parliament.uk/bills/2015-16/accesstomedicaltreatmentsinnovation.html>>.

²⁷ Available online at <<https://www.supremecourt.uk/cases/docs/uksc-2014-0251-judgment.pdf>>. Noted by *A Dickinson* (2015) 131 *Law Quarterly Review* (LQR) 542; *CDL Hunt* [2015] *Cambridge Law Journal* (CLJ) 392.

his resorting to drink, drugs and self-harm, several attempts at suicide and stays in psychiatric hospital. The publication was opposed by his former wife, now living with his son in the United States, on the basis that the description of the abuse, and the graphic terms in which it was depicted, risked causing psychological harm to the boy, now aged 12 and suffering himself from various mental health issues. She brought proceedings in the son's name (anonymised in the court papers) alleging that publication of the book would constitute a tort against him under the rule in *Wilkinson v Downton*,²⁸ applying to the intentional causation of physical or psychological harm. She sought an injunction requiring the deletion of passages in the book in which the defendant described his abuse and its effects.

- 13 Following a hearing in private, Bean J rejected the application for an interim injunction, holding that a cause of action under *Wilkinson v Downton* did not extend beyond false or threatening words. The Court of Appeal allowed the child's appeal on the basis that the tort was not limited in that way, ruled that the case should proceed to trial, and granted an interim injunction pending the trial.²⁹ The defendant appealed to the Supreme Court.

b) Judgment of the Supreme Court

- 14 The Supreme Court unanimously allowed the appeal, finding in the defendant's favour. There was no arguable case that publication of the book would give rise to liability under *Wilkinson v Downton*. The judgment of the Court was delivered by Lady Hale and Lord Toulson, with whom Lord Clarke and Lord Wilson agreed; Lord Neuberger, with whom Lord Wilson also agreed, gave a separate concurring judgment.
- 15 Lady Hale and Lord Toulson noted that the injunction awarded by the Court of Appeal was novel in two respects. First, the material which the defendant was banned from publishing was not deceptive or intimidatory but autobiographical. Second, the ban was principally directed, not to the substance of the autobiographical material, but to the vivid form of language used to communicate it. The appeal therefore raised important questions about freedom of speech as well as about the nature and limits of liability under *Wilkinson v Downton*.³⁰
- 16 The tort recognised in that case consists of three elements: a conduct element; a mental element; and, a consequence element. Only the first and second were issues before the Supreme Court.³¹ The conduct element requires words or con-

²⁸ [1897] 2 Queen's Bench (QB) 57.

²⁹ [2014] Court of Appeal, Civil Division (EWCA Civ) 1277, [2015] Entertainment and Media Law Reports (EMLR) 67.

³⁰ [2016] AC 219, [72].

³¹ *Ibid* [73].

duct directed towards the claimant for which there was no justification or reasonable excuse, and the burden of proof is on the claimant.³² On the facts, the publication was ‘directed towards’ a wide public, and the justification had to be assessed accordingly, and not in relation to the claimant in isolation,³³ contrary to the view of the Court of Appeal.³⁴ Taking all the relevant factors into account, there was every justification for the publication, both so that the defendant could tell the world about his suffering and so that others could read his story.³⁵ Freedom to report the truth is a basic right to which the law gives a very high level of protection, and it would be difficult to envisage circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for intentionally publishing facts causing distress; the right to report the truth, though not absolute, is generally justification in itself.³⁶

- 17 The Supreme Court rejected the idea that the defendant could be made by injunction to publish a bowdlerised version of his book, abstaining from graphic language. The language the defendant used gave an insight into his experiences and to lighten its darkness would be to reduce its effect. In principle, the right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively.³⁷ Further, as a practical matter, the suggested prohibition of ‘graphic’ language was insufficiently specific to convey with clarity and certainty what was to be done, as an injunction properly requires.³⁸
- 18 As regards the required mental element, there were two issues to resolve. First, where a recognised psychiatric illness is the product of severe mental or emotional distress, (a) is it necessary that the defendant should have intended to cause illness or (b) is it sufficient that he intended to cause severe distress which in fact results in recognisable illness? The Supreme Court adopted option (b), which it considered would strike a just balance between the competing interests. It would allow liability to be imposed where a hostage taker demands money from the family of the hostage for his safe release, or a blackmailer threatens harm to a person unless the family of the victim meets his demands, and the relatives suffer severe distress causing them to develop a recognised psychiatric illness, but not where a person embroiled in a dispute with his neighbour makes a deliberately insulting remark which intends to be upsetting, but he does not anticipate or intend to cause the neighbour severe emotional distress, though

³² Ibid [74].

³³ Ibid [75].

³⁴ Ibid [74].

³⁵ Ibid [75].

³⁶ Ibid [76].

³⁷ Ibid [77].

³⁸ Ibid [78].

that unfortunately eventuates, leading to a recognised form of psychiatric illness.³⁹ Secondly, it was right to insist on an intention to cause physical harm or severe mental or emotional distress, and not mere recklessness, which is a word capable of different shades of meaning; in everyday usage it may include thoughtlessness about likely consequences, which ought not to attract liability.⁴⁰ Bearing these propositions in mind, the Supreme Court found that there was no basis for supposing that the defendant had an actual intention to cause psychiatric harm or severe mental or emotional distress to his son, and that provided a further reason for allowing the appeal.⁴¹

c) Commentary

- 19 As the Court noted,⁴² *Wilkinson v Downton* has been a source of much discussion and debate in legal textbooks and academic articles⁴³ but seldom invoked in practice. In the last 25 years it has had a modest resurgence, especially in the context of harassment.⁴⁴ The Court of Appeal's decision in the present case extended liability further than previous cases had gone and was criticised by commentators as a dangerous development for freedom of expression.⁴⁵ Conversely and predictably, the Supreme Court's reversal of the Appeal Court's decision was widely welcomed.⁴⁶ The decision clarifies that liability under *Wilkinson v Downton* requires words or conduct⁴⁷ directed towards the claimant for which there was no justification or reasonable excuse.⁴⁸ The latter aspect

³⁹ Ibid [85]–[87].

⁴⁰ Ibid [84] and [87].

⁴¹ Ibid [88] f.

⁴² Ibid [51].

⁴³ As regards the decision's context and early history, the Supreme Court noted that it had derived assistance from *M Lunney*, Practical Joking and its Penalty: *Wilkinson v Downton* in Context (2002) 10 Tort Law Review 168 and *K Oliphant*, The Structure of the Intentional Torts, in: JW Neyers/E Chamberlain/SGA Pitel (eds), *Emerging Issues in Tort Law* (2007).

⁴⁴ See especially *Khorasandjian v Bush* [1993] QB 727; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932; but note also the impact in this context of the Protection from Harassment Act 1997.

⁴⁵ See especially *YK Liew*, The Rule in *Wilkinson v Downton*: Conduct, Intention, and Justifiability (2015) 78 Modern Law Review (MLR) 349.

⁴⁶ *Dickinson* (2015) 131 LQR 542; *Hunt* [2015] CLJ 392.

⁴⁷ Lord Neuberger considered that distinct considerations applied to words and actions, and left open whether the rules formulated in the decision applied not just to the former but also the latter: *O (A Child)* [2016] AC 219, [103].

⁴⁸ Lord Neuberger was doubtful about formulating the test in terms of justification or reasonable excuse, and preferred to ask if the statement was 'gratuitous': ibid [106] and [110] f. For a fuller list of differences between Lord Neuberger's approach and that taken in the judgment of the Court, and an evaluation of the rival approaches, see *Dickinson* (2015) 131 LQR 542, 544 ff.

was crucial in the case, as the father's interest in telling his own story clearly provided adequate justification for what he did.

- 20 The ruling that the mental element of the tort is made out by an intent⁴⁹ to cause severe⁵⁰ mental or emotional distress falling short of a recognised psychiatric injury is perhaps significant in suggesting that the scope of the tort may eventually be widened beyond cases where psychiatric harm actually results, so that the mental and consequence elements match one another, but that remains to be seen. It was not argued before the Supreme Court that intentionally causing severe distress - unaccompanied by psychiatric illness - should be actionable under *Wilkinson v Downton*,⁵¹ but in *Wainwright v Home Office*⁵² Lord Hoffmann had discussed the issue and saw some merit in extending liability to such a case, though he declined to express any concluded opinion.⁵³ In the present case, Lord Neuberger stated that there was much to be said for Lord Hoffmann's view, but also reserved his opinion on the matter.⁵⁴
- 21 Another open question is whether, over time, the tort will come to be further limited by a requirement that the defendant's conduct should have been extreme and outrageous, as currently stipulated in Canada and the United States.⁵⁵ The majority of the Supreme Court inclined to the view that such limitation was unnecessary: the tort was already sufficiently contained by its existing elements.⁵⁶ But Lord Neuberger thought there might be something to be said for adopting an outrageousness test in place of the (in his view) question begging and subjectively assessed test of justification or reasonable excuse
- 22 It may be noted that the claimant did not attempt to rely upon the tort of negligence in the Supreme Court, having failed to establish liability on that basis in the Court of Appeal, which ruled that it would not be fair, just and reasonable to impose on parents a general common law duty to protect their children from

⁴⁹ Lord Neuberger stated that causing distress had to be the defendant's primary, though not necessarily his sole purpose: *O (A Child)* [2016] AC 219, [114]. No comparable limitation appears in the judgment of the Court.

⁵⁰ Lord Neuberger appears again to differ from the majority, saying that the degree of distress which is intended must be significant, and not trivial, but not specifying that the intended distress must be severe: *O (A Child)* [2016] AC 219, [114].

⁵¹ *Ibid* [73].

⁵² [2003] United Kingdom House of Lords UKHL 53, [2004] 2 AC 406, noted by *K Oliphant*, England and Wales, in: H Koziol/BC Steininger (eds), ETL 2003 (2004) 113, no 52 ff.

⁵³ *Wainwright* [2004] 2 AC 406, [44]–[46].

⁵⁴ *O (A Child)* [2016] AC 219, [116]–[119].

⁵⁵ As to Canada, see *Rahemtulla v Vanfed Credit Union* [1984] 3 Western Weekly Reports 296 (British Columbia Supreme Court). As to the United States, see *American Law Institute*, Restatement of the Law, Torts 2d (1965) sec 46(1); *id*, Restatement of the Law, Torts: Liability for Physical and Emotional Harm 3d (2012) sec 46.

⁵⁶ *O (A Child)* [2016] AC 219, [88].

emotional or psychological injury.⁵⁷ Lord Neuberger expressly approved the Appeal Court's reasoning on this point.⁵⁸

2. *Michael and others v Chief Constable of South Wales Police and another* [2015] UKSC 2:⁵⁹ Police Liability in Negligence for Failing to Prevent Crime

a) Brief Summary of the Facts

- 23 At 2.29am on 5 August 2009, Joanna Michael made an emergency call to the police after her ex-partner found her at home with another man. He had been aggressive towards her and, according to the transcript of the call, had said: 'I'm going to drop him home and (inaudible) [fucking kill you]'.⁶⁰ Whilst Michael lived within the South Wales Police area, her mobile phone call was picked up by a mast in a neighbouring county and so routed through to Gwent Police. In written evidence, the call handler stated that she heard Michael say 'hit' rather than 'kill'. Nevertheless, she graded the call as 'G1', meaning an immediate police response was required. She notified South Wales Police but made no mention of a threat to 'kill' and so South Wales Police graded the call as 'G2', meaning that a police response was required within 60 minutes. At 2.43am, Michael called the police again but, as before, her call was routed through to Gwent Police. She was heard screaming before the line went dead. South Wales Police were immediately informed but Michael's ex-partner had already stabbed her to death by the time they attended her home at 2.51am. The ex-partner subsequently pleaded guilty to murder and was sentenced to life imprisonment.
- 24 Michael's family pursued claims against the police in negligence and under the Human Rights Act 1998 (HRA) for breach of art 2 of the European Convention of Human Rights (ECHR). However, the police applied for the claims to be struck out or for summary judgment. In relation to the art 2 claim, it was argued that even if the call handler should have heard the word 'kill' or asked Michael to repeat what she was saying if she was unsure, it would not be enough for a reasonable person to conclude that there was a real and immediate threat to her life. In relation to the negligence claim, it was argued that the police did not owe Michael a duty of care. The judge at first instance found that both claims should proceed to trial. The Court of Appeal upheld that decision in respect of

⁵⁷ [2015] EMLR 67, [48]–[57] (Arden LJ).

⁵⁸ [2016] AC 219, [94].

⁵⁹ 28 January 2015.

⁶⁰ There was no explanation as to why the final three words appeared in square brackets within the transcript: at [8] per Lord Toulson.

the art 2 claim but gave summary judgment in favour of the police in the negligence claim.⁶¹ The family appealed and the police cross-appealed to the Supreme Court.

b) Judgment of the Court

- 25 The Supreme Court unanimously held that the human rights claim should proceed. Whether the police were in breach of art 2 was a question of fact to be investigated at trial.⁶² However, by a majority of 5:2 (Lord Kerr and Lady Hale dissenting), the Court dismissed the Michael family's appeal in relation to negligence. The general rule is that there is no duty to prevent harm from third parties and this applies equally to the police.⁶³ Whilst there are two exceptions to this general rule – first, where the defendant is in control of the third party and second, where the defendant has made a clear representation on which the claimant has relied – neither was satisfied on the facts of the case. At no time were the police in control of the ex-partner and whilst the call handler had said she would pass the call on to South Wales Police, she gave no promise of how quickly they would respond and she did not advise Michael to remain in her home, as had been argued.⁶⁴ As such, in order to find a duty, the Court would need to extend the existing common law, which would not be appropriate. It was for Parliament to determine whether compensation beyond that already provided by the state-run Criminal Injuries Compensation Scheme should be available.⁶⁵
- 26 In contrast, the minority argued that the time had come to recognise that the police owe a duty to protect individuals they know to have been threatened by someone whose actions they are able to restrain.⁶⁶ They were not convinced that this would require a development of the common law, as suggested by the majority, but were sanguine about that prospect if this were the case.⁶⁷

c) Commentary

- 27 It was well recognised that the police response to Michael's emergency call was lacking. The Independent Police Complaints Commission seriously criticised both Gwent and South Wales Police forces for individual and organisational failures.⁶⁸ The issue was whether the public law duty of the police to prevent violence and disorder should sound in private law. The police have certainly

⁶¹ [2012] EWCA Civ 981.

⁶² At [139] per Lord Toulson.

⁶³ At [97] to [101] and [115] per Lord Toulson.

⁶⁴ At [135] per Lord Toulson.

⁶⁵ At [130] per Lord Toulson.

⁶⁶ At [175] per Lord Kerr.

⁶⁷ Ibid.

⁶⁸ At [16] per Lord Toulson.

attracted negligence liability in the context of operational failures. For example, the police were held liable in *Knightley v Johns* following their mismanagement of a road traffic accident scene.⁶⁹ The police also owe a duty to assess whether prisoners pose a suicide risk and to act accordingly.⁷⁰ However, the ‘core principle’ emerging from *Hill v Chief Constable of West Yorkshire* is that the police do not owe a private law duty to individual members of the public to protect them from crime.⁷¹ *Hill* concerned an alleged failure by the police to detect and detain a known serial killer. The claim was struck out on the basis that the police did not owe the killer’s final victim a duty of care. Not only was there insufficient proximity – she was simply one of a vast number of females at risk – but there were also a number of policy reasons which meant that the police should be ‘immune’ from such actions. Imposing a duty would not only encourage a detrimentally defensive frame of mind and lead to the diversion of limited police resources but would also require the courts to evaluate matters of policy and discretion, which would not be appropriate.

- 28 The courts have since refined the policy justifications underlying the core principle, clarified that it involves an absence of duty rather than a blanket immunity and suggested that a duty could potentially arise in ‘exceptional’ cases or cases involving ‘outrageous negligence’.⁷² Nevertheless, a majority in the House of Lords decided in *Smith v Chief Constable of Sussex Police* that the core principle should also apply where the police have failed to respond to specific threats of imminent injury involving known individuals.⁷³ *Michael* sought to challenge this controversial legal position and, whilst unsuccessful, revealed the scope of disagreement surrounding the treatment of such cases.⁷⁴
- 29 Lord Toulson, with whom the majority agreed, firmly grounded his decision in the common law principle that there is generally no liability for omissions.⁷⁵ As the case did not fall within any of the existing exceptions to this general rule, the question was whether the Supreme Court should create a new exception to cover cases such as *Michael*.⁷⁶ However, a detailed examination of existing case law concerning the police and other emergency services did not support

⁶⁹ [1982] 1 WLR 349.

⁷⁰ *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360 and *Orange v Chief Constable of West Yorkshire Police* [2002] QB 347.

⁷¹ [1989] AC 53.

⁷² *Brooks v Commissioner of Police for the Metropolis* [2005] 1 WLR 1495.

⁷³ [2009] 1 AC 225. For criticism of this decision, see *M Burton*, *Failing to Protect: Victims’ Rights and Police Liability* (2009) 72 MLR 283.

⁷⁴ For two contrasting views on the issue see *S Tofaris/S Steel*, *Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink*, University of Cambridge Faculty of Law Research Paper No 39/2014 (2014) and *N McBride*, *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, University of Cambridge Faculty of Law Research paper No 21/2015 (2015).

⁷⁵ At [97] per Lord Toulson.

⁷⁶ At [102] per Lord Toulson.

the incremental development of negligence in this way. This was in part because policy arguments previously urging caution in this area remained valid. Lord Toulson accepted that criticisms of the defensive policing hypothesis had force.⁷⁷ However, he felt that the court would ‘risk falling into equal error’ if it were to accept the proposition that imposing a duty would reduce domestic violence or lead to an improvement in its investigation, given there was no evidence to support either proposition. He noted that failures to respond properly to domestic violence already carry disciplinary consequences and that it was speculative to assume that the addition of tortious liability would affect the conduct of individual police officers and support staff. Whilst it was possible that tortious liability could affect the police at an institutional level in terms of increasing resources devoted to domestic violence, it would not be in the public interest for police priorities to be determined by the risk of being sued.⁷⁸ The only certain consequence was that the imposition of liability on police in such cases would have potentially significant financial implications.⁷⁹ Moreover, the fact that a protective system had been set up using public resources did not mean that the public at large should pay when a third party, for whose actions the state is not responsible, causes harm.⁸⁰

- 30 In contrast, Lord Kerr, with whom Lady Hale concurred, argued that the general rule that there is no duty to prevent harm from third parties should not apply in the context of the police whose duty is to provide protection against the very kind of harm suffered by Michael.⁸¹ He argued that the Court should instead return to the ‘true ratio’ of *Hill* which provides that a duty can arise in such cases if there is: reasonable foreseeability of harm; sufficient proximity of relationship and it would be fair, just and reasonable to impose such a duty.⁸² He rejected the notion that proximity can only arise where there has been an express assumption of responsibility by unambiguous undertakings on the part of the police and an explicit reliance on those by the claimant or victim as this was not only arbitrary but also failed to reflect the practical realities of life. Victims in the position of Michael are in a highly vulnerable, agitated and frightened state and the incidence of liability should not depend on the happenstance of a call handler uttering words that could later be construed as conveying an unmistakable undertaking that the police would prevent an attack.⁸³

⁷⁷ For criticism of the defensive policing hypothesis, see *C McIvor*, Getting Defensive about Police Negligence: The *Hill* Principle, the Human Rights Act 1998 and the House of Lords (2010) 69 CLJ 133.

⁷⁸ At [121] per Lord Toulson.

⁷⁹ At [122] per Lord Toulson.

⁸⁰ At [114] per Lord Toulson.

⁸¹ At [181] per Lord Kerr.

⁸² At [157] per Lord Kerr.

⁸³ At [167] per Lord Kerr.

- 31 Instead, sufficient proximity of relationship should arise where: (i) there is a closeness of association between the claimant and the defendant, which can but need not necessarily arise from information communicated to the defendant; (ii) that information conveys to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken; (iii) the defendant is a person or agency who might reasonably be expected to provide protection in those circumstances and (iv) the defendant is able to provide for the intended victim's protection without unnecessary danger to himself.⁸⁴ In essence, the existence or otherwise of proximity should depend on the facts of each case and the quality of the information given to the police. In Lord Kerr's opinion there was sufficient proximity in the context of *Michael*.⁸⁵ In addition, it would be fair, just and reasonable to impose a duty because the policy based justifications often raised to prevent a duty from arising lacked empirical foundation and were in tension with the fundamental principle that wrongs should be remedied.⁸⁶
- 32 Lord Toulson criticised Lord Kerr's approach to proximity as 'circular' as it amounted to little more than saying that there is a relationship of proximity if the relationship is sufficiently close for there to be proximity.⁸⁷ However, Lord Kerr argued that this was true of any test of proximity, and stated that it reflected 'a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility'.⁸⁸
- 33 There was also much disagreement about the desirability of drawing distinctions between claims that should and should not proceed. Two charities, Refuge and Liberty, intervened in the appeals and argued in favour of a broad proposition that a duty should arise where the police are aware or ought reasonably to be aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group. In addition, the appellants relied on Lord Bingham's dissenting judgment in *Smith* to advance a narrower proposition that a duty should arise where a member of the public furnishes the police with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to her life or physical safety.⁸⁹ Echoing concerns raised in *Smith*, Lord Toulson argued that to find a duty on either a broad or narrow basis would create uncertain dividing lines and arbitrary distinctions. For example, it would be unsatisfactory to distinguish

⁸⁴ At [144] per Lord Kerr.

⁸⁵ At [168] and [173] per Lord Kerr.

⁸⁶ At [184] to [186] per Lord Kerr.

⁸⁷ At [133] per Lord Toulson.

⁸⁸ At [147] per Lord Kerr, citing Richardson J in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Collins* [1992] 2 New Zealand Law Reports (NZLR) 282, 306.

⁸⁹ *Smith* (fn 73) at [44] per Lord Bingham. In support of Lord Bingham's proposition, see *K Horsey, Trust in the Police? Police Negligence, Invisible Immunity and Disadvantaged Claimants* in: J Richardson/E Rackley (eds), *Feminist Perspectives on Tort Law* (2012).

claims based on: who reported the threat; whether the threat was credible and imminent or credible but not imminent; whether or not the whereabouts of the person making the threat was known; and whether the threat was aimed at physical injury or property.⁹⁰

- 34 Lord Kerr felt such concerns were exaggerated and noted that it was entirely proper for the law to attach greater importance to the protection of life and physical well-being than to property.⁹¹ He recognised that the law should seek to strike a measured and careful balance between the effective administration of policing and the need to protect vulnerable individuals from serious harm. However, he believed that limiting liability of the police to preventing imminent attacks they were in a position to prevent would provide a workable basis on which the police could be held responsible on the one hand but without imposing an impossible burden on the other. In any event, he argued, the supposed arbitrariness of such an approach should not prevent the law from imposing liability in cases involving glaring omissions where grievous consequences ensue.⁹²
- 35 The Justices also disagreed on the appropriate relationship between tort-based claims and human rights claims.⁹³ It had been submitted that the common law should be developed in such a way as to encompass duties owed by the police under the ECHR. Lady Hale sympathised with this argument, noting that as the police are already subject to arts 2 and 3, policy justifications for the absence of a private law duty had ‘largely ceased to apply’.⁹⁴ However, on behalf of the majority, Lord Toulson reiterated views to the contrary expressed in earlier case law. In response to similar arguments advanced in *Smith*, Lord Brown had accepted that the HRA had weakened the value of the core principle in *Hill* insofar as it was intended to protect the police from the diversion of resources.⁹⁵ Nevertheless, he noted that this should not affect the common law because, as Lord Bingham had outlined in *R (Greenfield) v Secretary of State for the Home Department*, the HRA is not a tort statute and human rights actions have different and broader objectives.⁹⁶ Whilst civil actions are intended to compensate claimants for losses sustained, HRA claims are intended to uphold and vindicate minimum human right standards. This is why they have different time limits and different approaches to damages and causation. As such, Lord Toulson stressed that there was no basis for ‘gold plating’ the claimant’s Convention rights by

⁹⁰ At [117] to [137] per Lord Toulson.

⁹¹ At [172] per Lord Kerr.

⁹² At [171] per Lord Kerr.

⁹³ See further, *I Steele*, Negligence Liability for Failing to Prevent Crime: The Human Rights Dimension (2008) 67 CLJ 239.

⁹⁴ At [196] per Lady Hale.

⁹⁵ T [137] per Lord Brown.

⁹⁶ [2005] 1 WLR 673.

providing compensation on a different basis in tort. It was not necessary to develop the existing law of negligence to comply with arts 2 and 3 of the ECHR.⁹⁷

- 36 In some ways the overall outcome of *Michael* is conflicting. On the one hand, in closing the door to cases such as *Michael*, the majority decision represents a hardening of the common law position. The possibility of a duty arising in ‘exceptional’ or ‘outrageous’ cases was not mentioned and indeed appears to have been ruled out given the reluctance to carve out exceptions to the general principle that there is no liability for omissions. However, on the other hand, the dissenting judgments of Lord Kerr and Lady Hale indicate growing judicial disagreement on the current legal position which, though differing in their reasoning, add weight to Lord Bingham’s earlier dissent in *Smith*. The fact that judges at the highest level disagree on the correct approach to be taken in deciding whether a duty is owed, the appropriateness of the policy arguments associated with such claims and the practicability and desirability of finding a duty in some cases and not others could encourage further challenges to the scope of the core principle in the future.
- 37 However, in respect of the appropriate relationship between private law claims and human rights claims, it should be noted that the majority position in *Michael* was followed by the Court of Appeal in *DSD v Commissioner of the Police for the Metropolis*.⁹⁸ Victims of the so-called ‘black cab rapist’ pursued claims against the police under art 3 for systemic failures to investigate their complaints of rape and sexual assault. Whilst the appellants in *Michael* argued that the common law should develop in such a way as to reflect the ECHR, the police in *DSD* pursued the converse argument that art 3 should be moderated by the common law. In other words, it was argued that the victims should have no recourse under the HRA for a failure to investigate crimes committed by private parties and for which the police were neither directly nor indirectly responsible. In rejecting that argument, the Court of Appeal found that the State is under a duty to investigate allegations of ill-treatment of the gravity contemplated by art 3, whether that ill-treatment derives from State or non-State agents, such as criminals.⁹⁹ However, there is a sliding scale in this respect from deliberate torture by state officials to the consequences of negligence by non-state agents and the energy required of the State to combat such ills would be variable.¹⁰⁰ In reaching this decision, Lord Justice Laws noted that the differences between the ECHR and common law are practical as well as theoretical.¹⁰¹ Whilst damages in private law are awarded as of right, under the ECHR they are awarded at the court’s discretion. In addition, in relation to breach, the focus of a human rights claim is not the claimant’s loss but ‘the maintenance of

⁹⁷ At [125] per Lord Toulson.

⁹⁸ [2015] EWCA Civ 646, [2016] QB 161.

⁹⁹ At [44] per Lord Justice Laws.

¹⁰⁰ At [45] per Lord Justice Laws.

¹⁰¹ At [67] per Lord Justice Laws.

a proper standard of protection'.¹⁰² In the context of this particular case, this meant that the focus was not on the effects on the claimant but on the nature and sufficiency of the investigative steps taken by the State.¹⁰³

3. Personal Injury

a) Trends in Personal Injury Claims

- 38 As reported in European Tort Law 2012, the Government introduced a tranche of civil justice reforms which were implemented in April 2013 and designed to re-balance a system it believed had become too claimant-friendly.¹⁰⁴ By significantly reducing the profitability of personal injury claims for claimant lawyers, the reforms were intended not only to reduce the cost of resolving claims but also to reduce 'unnecessary and excessive litigation', though these terms were used without definition.¹⁰⁵ The reforms led to a significant reorganisation of the market involving mergers and acquisitions. Also, several well-known solicitors' firms went out of business, whilst others withdrew from certain areas, or even all, personal injury work. The reduction in the overall number of claims has not been quite as dramatic as the market re-organisation suggested it might be. Claims reduced by 6% in the first three years of the reforms. In April 2013/2014, there were 1,016,801 claims but this fell to 998,359 in 2014/2015 and to 981,324 in 2015/2016. The reductions have affected all types of claims though road traffic accidents continue to dominate, constituting 78% of all claims.¹⁰⁶

b) Parliamentary Activity

- 39 Government efforts to control levels of claiming and, in particular, to tackle fraudulent claims continued in 2015. Sections 58-61 of the Criminal Justice and Courts Act 2015 extended the existing ban on offering financial or other inducements to claim to all regulated persons, including lawyers. The ban had previously only applied to claims management companies.¹⁰⁷ In addition, sec 57 of the same Act provides that, where a claimant has been fundamentally

¹⁰² Ibid.

¹⁰³ At [68] per Lord Justice Laws.

¹⁰⁴ See *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger (eds) ETL 2012 (2013) 163, no 1 ff.

¹⁰⁵ Ministry of Justice, Overarching Jackson Proposals: Impact Assessment (2011) 1.

¹⁰⁶ Statistics on the number and type of claims pursued each year are publicly available from the Compensation Recovery Unit:
<<https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data>>.

¹⁰⁷ Rule 6b, Claims Management Services Regulation Conduct of Authorised Persons Rules 2014.

dishonest in relation to the primary or a related claim, a court must dismiss the claim in its entirety unless it is satisfied that the claimant would suffer substantial injustice as a result.¹⁰⁸ The provision reversed the Supreme Court's decision in *Summers v Fairclough Homes Ltd*, which was reported in *European Tort Law* 2012.¹⁰⁹ In that case, it was found that courts did have the power to strike out fraudulently exaggerated claims but extensive restrictions were placed on its use. The Justices were ultimately driven by the desire to protect the genuine part of the claim which resulted from the defendant's breach of duty. They were not convinced that striking out was necessary to deter dishonest claims, noting that there are many other ways deterrence could be achieved, including making adverse costs orders and pursuing criminal proceedings or proceedings for contempt of court. Whilst the Court stressed that the power to strike out was not a power to punish but to protect the court's process, there is a clear punitive element to sec 57 even though it was largely promoted on the basis that it would help reduce the number of dishonest claims. Claimant lawyers have warned that the provision could lead to spurious allegations of fraud designed to place undue pressure on claimants to under-settle their claims. They have also warned of satellite litigation over the meaning of 'fraudulent dishonesty' and 'substantial injustice'.¹¹⁰ Whilst sec 57 has been invoked by insurers, satellite litigation has not yet ensued and its impact on the bargaining process is as yet unclear.¹¹¹

- 40 In addition to the above, the Government established an Insurance Fraud Taskforce (IFT) in January 2015, which in turn created a Personal Injury Sub Group.¹¹² This Group revealed much disagreement on the scale of fraud within the personal injury process and the appropriate way forward. It did suggest banning 'pre-med' offers - offers of settlement before the claimant's injury has been medically assessed - but the IFT later recommended that the Association of British Insurers should simply discourage the practice amongst its members.¹¹³ Following cross-industry efforts to encourage data-sharing, promoted by the IFT, those pursuing lower value road traffic accident claims must first undergo a 'claims history' check via a data sharing platform called AskCue

¹⁰⁸ A 'related claim' is defined in sec 57(8) as one which is made by another person in connection with the same incident or series of incidents in connection with which the primary claim is made.

¹⁰⁹ [2012] UKSC 26, [2012] 1 WLR 2004. See *Morris/Oliphant* (fn 104) no 38 ff.

¹¹⁰ *J Hyde*, *Lawyers Alarmed by 'Fundamental Dishonesty' Clause*, *Law Society Gazette*, 23 July 2014.

¹¹¹ *J Hyde*, *Insurer Invokes 'Fundamental Dishonesty' to Set Off Claims*, *Law Society Gazette*, 4 September 2015 and *J Hyde*, *Claimants Defeated in First 'Fundamental Dishonesty' Trial*, *Law Society Gazette*, 14 April 2016.

¹¹² *Fraud Task Force – Personal Injury Sub Group*, *Recommendations to the HMT Task Force* (2015).

¹¹³ *Ibid* 13.

PI.¹¹⁴ However, the IFT has recommended that data-sharing should be extended.¹¹⁵

41 2015 also saw the implementation of a proposal, discussed in European Tort Law 2014, to introduce independent medical panels to assess whiplash claims.¹¹⁶ There has been significant commercial interest in encouraging the pursuit of such claims in recent years and, as whiplash injuries cannot be objectively diagnosed, there have been associated concerns about fraud and exaggeration. It was hoped that independent medical reporting would support better diagnosis.¹¹⁷ As a result, the Government worked with stakeholders to establish 'MedCo', an internet hub which produces a choice of randomly generated medical experts or medical reporting organisations with no financial link to the person commissioning the report.¹¹⁸ There have been some teething issues with the scheme and within only two months the Government reviewed the MedCo framework.¹¹⁹ Claimant lawyers complained that the choice of experts available was too limited and that randomly selected experts were sometimes an unworkable distance away. In addition, whilst experts are required to meet quality criteria in order to join MedCo, there was some concern that experts were 'self-certificating' without query.¹²⁰ Claimant lawyers have been accused of gaming the system by manipulating the search function or submitting searches repeatedly in order to achieve their desired outcome.¹²¹ In 2016, the Ministry of Justice formulated a number of proposals to address these issues.¹²²

42 Finally, for many years, insurers have been lobbying for an increase in the personal injury small claims limit from £ 1,000 to £ 5,000.¹²³ In October 2013, the

¹¹⁴Pre-Action Protocol for Low-Value Personal Injury Claims in Road Traffic Accidents, para 6.3A. See further, *J Hyde*, Insurers Open Data to Claimant Solicitors in Fraud Crackdown, *Law Society Gazette*, 27 April 2015.

¹¹⁵*Insurance Fraud Taskforce*, Final Report (2016) 57–59.

¹¹⁶See *A Morris/K Oliphant*, England and Wales, in: E Karner/BC Steininger (eds) *ETL* 2014 (2015) 160, no 24 ff. As to whiplash claims generally, see *K Oliphant*, 'The Whiplash Capital of the World': Genealogy of a Compensation Myth, in: E Quill/R Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (2016).

¹¹⁷*Ministry of Justice*, Reducing the Number and Costs of Whiplash Claims: A Government Response to Consultation on Arrangements Concerning Whiplash Injuries in England and Wales (2013).

¹¹⁸See further, <www.medco.org.uk>.

¹¹⁹*Ministry of Justice*, MedCo Framework Review: Call for Evidence (2015).

¹²⁰*Association of Personal Injury Lawyers*, MedCo Framework Review: A Response by the Association of Personal Injury Lawyers (2015).

¹²¹*N Rose*, Medco Suspends 20 Users for Trying to Game System, *Litigation Futures*, 13 May 2016.

¹²²*Ministry of Justice*, Outcomes of the MedCo Review (2016).

¹²³See *A Morris*, The Compensation Culture and the Politics of Tort, in: TT Arvind/J Steele (eds), *Tort and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2013).

Government stated that such an increase would be beneficial in providing a low cost route to court, with each side bearing its own costs. However, it was not persuaded it would be appropriate to introduce an increase at that stage. It accepted that an increase could have adverse effects on genuine claimants in terms of access to justice and under-settlement and stated that it needed time to consider appropriate safeguards. It also wanted time to consider how best to mitigate the negative effects of any increase, namely an increase in unscrupulous claims management companies entering the market and taking advantage of unrepresented claimants.¹²⁴ However, without evidence of progress in this respect, the Government announced in December 2015 that it intended not only to increase the small claims limit to £ 5,000 but also to significantly limit the market in whiplash by removing general damages for low-value, soft tissue injury claims.¹²⁵ Developments in this area will be reported in European Tort Law 2016.

c) Legal Issues

- 43 **Informed Consent to Medical Treatment.** In *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*, the House of Lords held that the *Bolam* test should be used in deciding whether a patient should have been warned of risks involved in medical treatment and the terms of any warning that should have been given.¹²⁶ For many years, therefore, the issue of consent was determined with reference to what a responsible body of medical opinion regarded as acceptable. However, the Supreme Court rejected this approach in *Montgomery v Lanarkshire Health Board* on the basis that it no longer reflected the modern reality of doctor-patient relationships.¹²⁷ It noted that the extent to which doctors discuss risks with patients is not determined by medical expertise but by their broader attitudes. In addition, the assumption underlying *Sidaway* that patients are uninformed and incapable of understanding medical matters is no longer appropriate. The law should reflect the fundamental importance of self-determination and treat patients insofar as possible as adults capable of understanding that medical treatment often involves risks and of living with the consequences of their choices. As such, an adult of sound mind is entitled to decide which, if any, of the available treatments to undergo and consent must be obtained before treatment interfering with bodily integrity is undertaken. This means that doctors are now under a duty to take reasonable care to ensure that patients are aware of any material risks involved in proposed treatment and, because it is impossible to consider a particular procedure in isolation, of any reasonable alternatives. A risk is material if a reasonable person in the patient's position would be likely to attach significance to it or if the

¹²⁴See above fn 83.

¹²⁵*HM Treasury*, Spending Review and Autumn Statement (2015).

¹²⁶[1985] AC 871. The 'Bolam test' was laid down in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

¹²⁷[2015] UKSC 11.

doctor is or should reasonably be aware that their patient would be likely to attach significance to it.¹²⁸

- 44 **Duty and Standard of Care in Cases Involving Mental Illness.** In *Dunnage v Randall and UK Insurance Ltd*, the Court of Appeal confirmed that the standard of care should not be adjusted to take account of the defendant's personal characteristics.¹²⁹ The claimant sought damages for injuries sustained when attempting to prevent his uncle from setting fire to himself. The uncle was subsequently diagnosed as suffering from paranoid schizophrenia. On the basis of psychiatric evidence, the judge at first instance held that the extreme nature of the manifestation of the uncle's mental illness meant that he had not been acting voluntarily and so did not owe the claimant a duty of care. However, the Court of Appeal allowed the claimant's appeal finding that the uncle both owed a duty of care and was in breach of that duty. The exception to the general rule carved out in respect of children should not be extended.¹³⁰ The court noted that law does not excuse a defendant from liability in negligence where he fails to meet the relevant standard of care partly because of a medical problem and there was no reason to distinguish physical and mental illness. As such, the uncle's illness did not preclude him from having to take reasonable care and his mind, although deluded, directed his actions.

- 45 **Insurers' Indemnity of Defendant Employers in Mesothelioma Claims.** In *Fairchild v Glenhaven Funeral Services Ltd*, the House of Lords held that, in terms of proving causation, it is sufficient for claimants suffering from mesothelioma to establish that their employer(s) materially increased their risk of harm by exposing them to asbestos.¹³¹ However, in *Barker v Corus UK Ltd*, the Lords then decided that in such cases each employer should only be liable in proportion to the extent to which they had materially increased the risk.¹³² This meant that claimants needed to sue all responsible employers in order to be fully compensated and could be undercompensated if any of their employers were insolvent. To address this, Parliament quickly introduced sec 3 of the Compensation Act 2006, which made each employer liable in full though with a right of contribution against other employers. *Zurich Insurance Plc UK Branch v International Energy Group Limited* concerned the extent to which insurers are liable to indemnify insurers in cases where *Fairchild* applies as, on the facts, Zurich had only provided cover for six of the twenty-seven years of exposure.¹³³ The case stemmed from Guernsey where the Compensation Act 2006

¹²⁸As the case was heard in the UK Supreme Court, the decision applies in England and Wales. However, the case arose within the Scottish jurisdiction and so is discussed in detail in the report for Scotland.

¹²⁹[2015] EWCA Civ 673.

¹³⁰*Mullins v Richards* [1998] 1 WLR 1304.

¹³¹[2003] 1 AC 32.

¹³²[2006] 2 AC 572.

¹³³[2015] UKSC 33.

does not apply and so was decided in accordance with the common law. However, the Supreme Court reflected on how the case would have been decided in England and Wales. By a majority of 4:3, it was stated that it would be unjust for an insurer who was on cover for only a small proportion of the period of exposure to indemnify the full amount of compensation. As such, whilst an insurer such as Zurich would be liable to indemnify for the full amount, it would also have an equitable right of contribution on a pro rata basis from other insurers providing cover during the period of exposure or from the employer itself if any of the insurers were insolvent.

C. Literature

1. Kit Barker/Ross Grantham/Warren Swain, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing 2015)

- 46 This timely and useful collection marks the golden anniversary of the decision of the House of Lords in *Hedley Byrne v Heller*, deciding that liability in damages may in principle arise in respect of pure economic loss caused by a negligent misstatement. In fact, as Barker reminds us in his outstandingly perspicacious introductory essay, the actual claim failed on a narrow point and what is really important about the case resides in dicta that were strictly immaterial to the outcome (4). The precise nature of the liability remains disputed and this debate is continued in the present volume by first-rate contributions from Robertson and Wang (providing a valuable analysis of the concept of assumption of responsibility) allied with Witting in seeing the liability as arising in negligence, and Beever, who sees it as contractual. Other essays provide critical analysis of how *Hedley Byrne* liability intersects with other liability regimes, specifically liability for equitable fraud and (in Australia) liability under statute for deceptive trade practices, or offer comparative reflections on the decision from the perspective of other common law jurisdictions (the United States, Canada, New Zealand and Australia). The book will be an important resource for those interested in the murky border region between contract and tort, from whatever legal background they come.

2. Mauro Bussani/Anthony J Sebok, *Comparative Tort Law: Global Perspectives* (Cheltenham, Edward Elgar Publishing 2015)

- 47 Bussani and Sebok have assembled an excellent collection of original essays on comparative tort law. The 'global perspective' of their title is amply validated by the remarkably wide-ranging and invigorating essay on 'the many cultures

of tort liability' with which Bussani and Infantino open Part I of the book (General Issues), and by Parts II and III which address, respectively, The Western Law of Torts and Non-Western Perspectives. The latter are provided for Japan, China, Sub-Saharan Africa and Latin America. Amongst the book's other highlights are Gordley's historical survey of the 'architecture' of the common and civil law of torts, Dyson on the relationship between tort and crime (see also nos 50 and 51 below), Infantino on causation theories and causation rules, and Jutras on alternative compensation schemes. Other leading scholars provide updates and/or new reflections on topics they have already addressed in well-known publications, including Werro and Büyüksagis on strict liability, Reimann on product liability, Palmer on pure economic loss and Sugarman on non-pecuniary damages for personal injury. The editors are to be congratulated on bringing together an outstanding team of contributors and on an exceptionally valuable final product.

3. *Paul S Davies, Accessory Liability* (Oxford, Hart Publishing 2015, Hart Studies in Private Law)¹³⁴

- 48 Accessory liability is not (yet) regarded as a distinct legal category in English private law but Davies's book sets out to change that perception. At present, the civil liability of a third party to a wrong done by A to B is addressed through a number of discrete principles in different legal compartments, including – to name only the most significant – the equitable liability for dishonest assistance, the tort of inducing a breach of contract and the law of joint tortfeasance (into which are fitted, somewhat uneasily, both the tort(s) of conspiracy and vicarious liability). To impose order on this ragbag collection of legal rules and concepts, Davies draws upon doctrines of accessory liability in the criminal law – to good effect. He persuasively suggests that similar principles underpin the imposition of liability upon an accessory regardless of the nature of the primary wrong and isolates three core components of such liability: a civil wrong by a primary wrongdoer (because accessory liability is derivative), a conduct element (participation) and a mental element (culpability). In his view, the need to balance the protection of the victim's rights with the accessory's legitimate freedom of action means that the conduct element should be given a broad definition but the mental element should be narrowly confined. With this in mind, he proposes the following, deceptively simple principle: knowingly assisting a wrong is itself wrong. Insofar as tort law is concerned, this would entail a significant extension of liability or, as Davies sees it, the filling of a gap in the law. He concedes, however, that a broad defence of justification would be needed – and indeed that different primary wrongs may legitimately generate different regimes of accessory liability. All in all, this is a mould-breaking book, based on deep learning and perceptive analysis, yet written in a clear and accessible style.

¹³⁴Reviewed by *W Day* (2016) 36 *Legal Studies* (LS) 382; *P-W Lee* (2016) 132 *LQR* 338.

4. Andrew Dyson/James Goudkamp/Frederick Wilmot-Smith (eds), *Defences in Tort* (Oxford, Hart Publishing 2015, Hart Studies in Private Law: Essays on Defences)

- 49 With a stellar international line-up of contributors (including such names as Burrows, Epstein, Goldberg, Ibbetson, McLachlin, Nolan and Stevens – to list just a few) this collection testifies to the resurgence of interest in tort law defences since the second-named editor's monograph on the topic in 2013.¹³⁵ In their thoughtful and probing introduction, the editors address a series of questions about the nature and role of defences: what is a defence?, are defences to be identified by the consequences that flow from their classification as such (eg as regards the burden of proof) or in some essential quality?, how are defences to be distinguished (if at all) from denials of liability?, and what do defences actually do? A number of themes emerge from their analysis: the interplay of defences with causes of action and defences; the generality – or, alternatively, specificity – of defences; how theories of tort law can dictate how we view defences; and their interplay with statute law. The editors also consider the insights that can be derived from criminal law, asking (for example) whether the distinction between justification and excuse is useful in tort too. (Answer: yes, albeit within limits.) Their introductory essay is the first of a series of contributions addressing general issues and themes relating to defences in tort, which together make up the first half of the book. The second half is given over to papers on specific defences: necessity, duress, statutory authority, illegality, contributory fault, assumption of risk, public interest (in privacy claims) and limitation. The general quality of the contributions is very good indeed and the collection as a whole can be enthusiastically recommended.

5. Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge, Cambridge University Press 2014)

- 50 In this, the first of two collections on the relationship of tort and crime under the same editorial hand, distinguished tort and criminal lawyers offer lucid and perceptive analysis of a range of issues arising where the two domains interact. Some are issues within tort law – for example, Spencer on when civil liability arises for damage caused by a crime and Virgo on the illegality defence in tort. Others are issues that are common to tort and crime but may be treated differently in each, such as causation (Steel), defences (Goudkamp), consent and assumption of risk (Simons) and complicity (Davies). Merkin and Steel consider the (criminal law) duty to insure against tortious liability for a motor vehicle accident on the public roads. Dyson and Green highlight the anomaly that stolen property may be more readily recovered by way of a criminal prosecution than by civil litigation. A number of the papers are contributions to legal theory,

¹³⁵ J Goudkamp, *Tort Law Defences* (2013), reviewed by A Morris/K Oliphant, in: E Karner/BC Steininger (eds), *ETL* 2013 (2014) 183, nos 51–53.

including Stevens' account of (inter alia) the distinction between torts and crimes, Duff on the civil and criminal law modes of vindicating rights, Sullivan's reflections on the necessity for wrongdoing as a condition for reparation and punishment and the different ideas of outcome responsibility in tort and criminal law, and McBride on the challenges posed by austerity for the functioning of tort and criminal law. In his introduction, the editor highlights the disjointed thinking that results from a failure to think systematically and rationally about the relationship of tort and crime in English law. This volume addresses that deficiency and provides much of real value to the inquiring scholar.

6. Matthew Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge, Cambridge University Press 2015)

- 51 This follow-up to the same editor's earlier collection on tort and crime approaches the relationship of these two legal categories from a comparative perspective. The book contains chapters dealing in turn with England (Dyson and Randall), France (Malabat and Wester-Ouisse), Germany (Hellwege and Wittig), Sweden (Friberg and Sunnqvist), Spain (Bachmaier Winter, Gómez-Jara Díez and Ruda-González), Scotland (Blackie and Chalmers), the Netherlands (Giesen, Kristen and Kool) and Australia (Burns et al). These are topped and tailed by the editor's introduction, incorporating a fine explanation of comparative law methodology and how it was employed in the book, and his concluding chapter, in which he seeks to crystallise what can be learnt from comparing 'tortious apples and criminal oranges'. For this, he highlights five areas in which tort and crime can be said to interact (institutions, reasoning, substance, procedures and resolutions) and then plots *how* they can be said to interact according to three axes (equality/hierarchy, partition/permeability and directness/indirectness). His analysis then makes plain the extensive use of 'legal transplants' whereby rules and practices from one legal system or sub-system are adopted in another, before turning to the reasons *why* tort and crime have interacted in the surveyed jurisdictions and *when* they have interacted. Throughout, Dyson demonstrates a remarkable grasp of the material presented in the preceding chapters and an impressive ability to encapsulate what can be learnt from it. The book as a whole can be enthusiastically recommended as an important contribution to the previously rather sparse literature.

7. Sarah Green, *Causation in Negligence* (Oxford, Hart Publishing 2015, Hart Studies in Private Law)

- 52 Green's excellent new monograph provides an accessible guide to the sometimes baffling case-law relating to the proof of causation in negligence actions. She successfully clarifies the issues by first disentangling different types of

causal problem, dealing in turn with over-determination, pre-emption, material contribution to injury and material contribution to risk, and loss of chance. Her second step is to propose a simple method, which she calls Necessary Breach Analysis, to deal with all aspects of the causal inquiry in negligence, even those hitherto regarded as difficult. Stage 1 is to ask whether it is more likely than not that a defendant's breach of duty changed the normal course of events so that damage occurred which would not otherwise have done so when it did. Stage 2, applied to each defendant individually, is whether the effect of the breach of duty was operative when the damage occurred. Green hopes that this approach will prove suitable for judicial adoption, and it must be admitted that its outcomes are to a considerable extent consistent with those now reached by the courts. But she is opposed to the idea of proportional liability (as she is to damages for loss of chance), which is not entirely consistent with the current jurisprudence, and is perhaps more pessimistic than necessary about the possibility of finding some (perhaps limited) role for proportional liability in English law, notwithstanding the difficulties arising in this regard from its adherence to the balance of probabilities as the standard of proof.

8. *Octavian Ichim, Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press 2015)

- 53 This impressively researched and carefully reasoned book, based on the author's doctoral thesis,¹³⁶ offers a public international lawyer's perspective on the award of just satisfaction under art 41 of the ECHR. Ichim notes that 'just satisfaction under the Convention is a relatively original notion as satisfaction in international law usually refers to a *particular form* of reparation – in respect of non-pecuniary damage that is not financially assessable – not reparation *in general*. He also contrasts the Strasbourg court's award of normally purely financial redress with the Inter-American Court's willingness to order a state to apologise or to express regret. Another contrast is that, under art 41, a finding of violation may be sufficient just satisfaction even though this is not accepted in general international law. Ichim subjects the key elements of the art 41 regime to detailed critical scrutiny, contrasting the concept of just satisfaction with the ideal of full compensation, and considering the notion of equity underpins it. He then explores the circumstances in which the Court awards compensation with analysis of the necessary conditions of a finding of a violation, the lack of full reparation under national law, the applicant's victim status and the necessity of pecuniary reparation to afford just satisfaction. In a particularly interesting section, he addresses the question of who it is that is entitled to claim compensation – not just individuals and groups of individuals but also states. The centrepiece of his analysis, however, focuses on the issues of damage and

¹³⁶ The thesis was submitted in 2012, which to some extent explains the author's failure to refer to *A Fenyves et al* (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2012).

damages: the types of harm that the Court recognises, and how it calculates the amount of compensation to be awarded. Ichim's main argument is that the Court's awards, especially for non-pecuniary damage, lack consistency and predictability, and its practice can sometimes be characterised as arbitrary. He therefore proposes the introduction of higher levels of standardization of awards and the elaboration of a theory of equity that allows a proper adjustment of the standardised amounts to fit the facts of individual cases. All in all, this is a very impressive work of scholarship and its arguments warrant serious attention.

9. Paul Mitchell, *A History of Tort Law 1900–1950* (Cambridge University Press 2015)¹³⁷

- 54 Mitchell has produced a fascinating and engagingly written history of English tort law in the first half of the twentieth century, a period including several defining moments in the history of English tort law. His account aims to place alongside each other rules and ideas that would traditionally not be found in close proximity so as 'to develop a picture of how tort saw the world: what assumptions were being made about the roles of those to whom its doctrines were applied, and what contribution did tort conceive of itself as making to social life?' (3). Thus, in place of the traditional headings of a tort textbook, the reader is faced with chapter titles like 'Definition and theory', 'War', 'Women', 'Children', 'Media', 'Roads' and 'Workmen' – to mention just the topics addressed in the first part of the book. The second part addresses the work of the Law Revision Committee, established in 1934, with particular reference to its work on topics in tort law: the effect of death on causes of action; contribution between joint tortfeasors; the (consequently abolished) liability of husbands for the torts of their wives; and contributory negligence. Throughout, Mitchell reminds us of attitudes, episodes and debates that have mostly been forgotten: how wartime blackout legislation impacted upon liability for road accidents; disputes about the erstwhile torts of enticement and seduction; the various legal devices enabling trespassing children to claim damages from the occupier; judicial reluctance to impose liability on the owners of straying livestock that caused road accidents; the common employment doctrine and attempts to circumvent it; etc. The major omission from Mitchell's account is the House of Lords' decision of *Donoghue v Stevenson* in 1932, which he explains on the (perhaps not entirely convincing) basis that it was only in the second half of the century that the case's foundational status came to be recognised (4). That authorial decision underlines that this is a very personal history of tort law in England: not *the definitive* history, but *a* history – and one which can be read with profit and enjoyed by anyone interested in how tort law was shaped at a pivotal period of its development.

¹³⁷ Reviewed by E Descheemaeker (2015) 78 MLR 695.

10. *Simon Taylor, Medical Accident Liability and Redress in English and French Law* (Cambridge, Cambridge University Press 2015)

- 55 English and French law have contrasting approaches to liability and redress in respect of medical accidents. English law is committed to fault-based liability and has no general mechanism to compensate those suffering iatrogenic injury where liability cannot be established. In France, by contrast, an innovative out-of-court scheme has provided compensation to victims of medical accidents since its introduction in 2002 without the need, in cases of serious injury, to prove fault. In the present volume, Taylor convincingly details the deficiencies of the English approach – not just the lack of reparation for the victims of blameless accidents but also the high costs of litigation, the difficulties and uncertainties facing those bringing claims and the adverse effects of a culture of blame on the doctor-patient relationship and patient safety. In his view, English lawyers and law reformers should look to learn from the French model of reform, under which claims are resolved by a cheap, simple and relatively rapid process and compensation is paid on a no-fault basis to the most seriously injured. Taylor is not uncritical of the French system, which he thinks (for example) could do more to promote patient safety through the use of claims data to generate information about medical accidents. A decisive factor, however, is that the overall cost of medical liability seems to be substantially lower in France than in England. Taylor's book is therefore a timely and important contribution to the ongoing debate about what redress should be available to victims of medical accidents. It deserves a wide readership not just in the legal community but also amongst those involved in the provision of healthcare.

11. New Editions of Existing Works

- 56 **Textbooks:** *Kirsty Horsey/Erika Rackley*, Kidner's Casebook on Torts (13th edn, Oxford University Press 2015); *Kirsty Horsey/Erika Rackley*, Tort Law (4th edn, Oxford University Press 2015); *David Howarth/Martin Matthews/Jonathan Morgan/Janet O'Sullivan/Stelios Tofaris*, Hepple and Matthews' Tort Law (7th edn, Hart Publishing 2015); *Christian Witting*, Street on Torts (14th edn, Oxford University Press 2015)
- 57 **Practitioners' reference:** *Ken Oliphant* (ed), The Law of Torts (3rd edn, LexisNexis 2015)

12. Selected Articles

- 58 **Tortious Liability in General:** *Jyoti Ahuja*, Liability for Psychological and Psychiatric Harm: The Road to Recovery (2015) 23 Medical Law Review (Med L Rev) 27; *John Gardner*, The many Faces of the Reasonable Person (2015)

131 LQR 563; *James Goudkamp/John Murphy*, Tort Statutes and Tort Theories (2015) 131 LQR 133; *Tony Honoré*, Responsibility for Harm to Others: A Brief Survey, in: P Davies/J Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing 2015); *Jonathan Morgan*, Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken [2015] CLJ 109; *Craig Purshouse*, Liability for lost autonomy in negligence: Undermining the coherence of tort law (2015) 22 Torts LJ 226; *Robert Stevens*, Salvaging of the Law of Torts, in: FS Lord Hoffmann (supra)

- 59 **Causation and Risk:** *Kit Barker/Jenny Steele*, Drifting towards Proportionate Liability: Ethics and Pragmatics [2015] CLJ 49; *Sarah Green*, But for Lord Hoffmann, How Would the Causal Inquiry in Negligence Look? in: FS Lord Hoffmann (no 58 above); *KR Handley*, Causation in Misrepresentation (2015) 131 LQR 275; *Jane Stapleton*, An 'Extended But-For' Test for the Causal Relation in the Law of Obligations (2015) 35 Oxford Journal of Legal Studies (OJLS) 687; *Sandy Steel*, Justifying Exceptions to Proof of Causation in Tort Law (2015) 78 MLR 729; *Gemma Turton*, Risk and the Damage Requirement in Negligence Liability (2015) 35 Legal Studies (LS) 75
- 60 **Defences:** *James Goudkamp*, A Long, Hard Look at *Gray v Thames Trains Ltd*, in: FS Lord Hoffmann (no 58 above); *James Goudkamp*, Apportionment of Damages for Contributory Negligence: A Fixed or Discretionary Approach? (2015) 35 LS 621; *James Goudkamp*, The Doctrine of Illegality: A Private Law Hydra (2015) 6 United Kingdom Supreme Court Yearbook 254
- 61 **Vicarious Liability:** *Paula Giliker*, Vicarious liability, non-delegable duties and teachers: can you outsource liability for lessons? (2015) 31 Journal of Professional Negligence (PN) 259; *Elizabeth-Anne Gumbel*, Developments in vicarious liability: a practitioner's perspective liability (2015) 31 PN 218; *Jonathan Morgan*, Vicarious liability for independent contractors? (2015) 31 PN 235; *Phillip Morgan*, Vicarious liability for group companies: the final frontier of vicarious liability? (2015) 31 PN 27
- 62 **Professional Liability:** *Rupert Jackson*, The professions: power, privilege and legal liability (2015) 31 PN 122
- 63 **Personal Injury:** *David Campbell*, Interpersonal Justice and Actual Choice as Ways of Determining Personal Injury Law and Policy (2015) 35 LS 430
- 64 **Defamation:** *Eric Descheemaeker*, Three Errors in the Defamation Act 2013 (2015) 6 Journal of European Tort Law (JETL) 24; *Eric Descheemaeker*, Mapping Defamation Defences (2015) 78 MLR 641; *Jan Oster*, Communication, Defamation and Liability of Intermediaries (2015) 35 LS 348

- 65 **Economic Torts:** *Roderick Bagshaw*, Lord Hoffmann and the Economic Torts, in: FS Lord Hoffmann (no 58 above); *Phillip Johnson*, The 'New' Tort of Passing Off (2015) 131 LQR 476